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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 1303

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,
Defendants.

ELINE'S INC.,
Petitioner and Appellant Below

vs.

LAKESIDE LABORATORIES, INC.,
Respondent and Appellee Below.

PETITION FOR WRIT CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the associate Justices, Supreme Court of the United States:

The petitioner prays for a writ of certiorari to review the judgment entered March 5, 1945 (motion for rehearing denied March 22, 1945) in the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed a judgment entered by the United States District Court for the Eastern District of Wisconsin in favor of the respondent.

OPINIONS BELOW

The majority opinion of the Circuit Court of Appeals (Circuit Judge William M. Sparks and District Judge Charles G. Briggle) and the minority opinion (Circuit Judge Evan A. Evans are reported in 148 Fed. (2) 39 (R 495-498). No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered March 5, 1945. Petition for rehearing was duly and seasonably filed with the Circuit Court of Appeals (R 501), which petition for rehearing was denied March 22, 1945 (R 507). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229 (43 Stat. 938) (28 U. S. C. A. 347).

The cases believed to sustain jurisdiction are as follows:

Mitchell v. United States, 267 U. S. 341.
Bothwell v. United States, 254 U. S. 231.
United States ex rel T. V. A. v. Powelson, 319 U. S. 266.

SUMMARY STATEMENT

In a condemnation proceeding instituted by the United States under the Second War Powers Act to acquire fee title to an industrial building development of about 670,000 square feet (R 78) owned by petitioner, a fund representing the entire value of the petitioner's lands and buildings as agreed between the United States and the petitioner was paid into the Registry of the District Court.

The respondent, Lakeside Laboratories, used a one-story cafeteria building of approximately 13,200 square feet at a rental ranging from $3,600 to $4,200 per year (R 417). The original lease was entered into on August 11, 1939 and

was for a period of five years, but to accomodate an expanding business, the lease was modified, extending the term of the lease to October 1, 1948, and giving to Lakeside the privilege of erecting at its own expense an annex to the cafeteria building (R 428). A one-story annex of 6511 square feet (R 350, 439) (structurally the same as the original cafeteria (R 162)) was erected in 1941 by Lakeside at a cost of approximately $21,000 (Ex. 26, R 67, 71-73, 78-79, 276-277, 284, 446). The rental stayed approximately the same under the modification. Lakeside did not claim any enhancement in the rental value for the unexpired term of the lease on the cafeteria building (R 175-176). The rental value on the cafeteria building, which was 35c per square foot per year, had not increased over the amount provided in the lease (35c per square foot per year) (R 175-76). Lakeside admitted that the annex erected by Lakeside likewise had a 35c per square foot per year rental value, but did not attempt to value the rental value of the annex for the balance of the term (R 198, 251-252).

Lakeside claimed, as part of just compensation, the reproduction cost of improvements in the cafeteria building added by Lakeside in the sum of $15,145.08, the cost of the annex, $21,027.42, the cost of installing equipment on the premises, $3,820.32, and other minor amounts, totalling $41,762.92 (Shown on Exhibit 26, R 445-453, 277), and received in evidence over the objection of Eline's (67, 71-73, 78-79, 276-277, 284) despite the provision in the lease to the effect that all improvements placed on the premises by Lakeside were to become the property of Eline's and be surrendered on termination of the lease by lapse of time or otherwise (R 406, 417, 429) and despite the fact that no evidence as to the value of the use of these improvements during the balance of the term was offered by Lakeside (R 144-145, 246, 251).

In addition to the foregoing element, Lakeside claimed as part of just compensation so-called "'ready-to-go" value (R 176, 208-209, 225). The trial court, over objection of Eline's (R 208-210, 212, 215-216, 218, 225, 230, 234, 235) permitted witnesses to testify that in addition to the fair rental value of the property and the reproduction cost of improvements, as shown on Exhibit 26 (R 67, 71-73, 78-79, 276-277, 284, 445-453), they attributed to the leasehold an additional "ready-to-go" value. The "ready-to-go" value is based upon what an alleged purchaser of the leasehold (combined with the equipment and the business) would be willing to pay for the leasehold combined with the equipment and business in order to go into possession and immediately produce pharmaceutical supplies, thus avoiding all delays incidental to getting the plant operating (R 209, 225-227). The valuation is based upon an estimate of the value of anticipated profits resulting from business to be conducted on the leased premises (R 212, 227-228). The evidence supporting the claim of so-called "ready-to-go" value which was receive over objection (R 208, 210, 212, 215-216, 218, 225, 230, 234, 235) and which the court refused to strike and allowed to go to the jury (R 218-219, 235, 411) may be briefly summarized as follows:

MICHAEL FRANK CHARLEY, a Chicago pharmaceutical manufacturer unfamiliar with real estate values (R 215) testified that in addition to the cost of the improvements in the cafeteria building, and the cost of the annex and expenses incidental to moving and installing the laboratory equipment shown on Exhibit 26, (R 67, 71-73, 78-79, 276-277, 284, 446) this lease had a ready-to-go value of $75,000, for one to take over the plant with all the equipment coordinated for manufacturing (R 208-209). This ready-to-go value is based upon a combined

sale of leasehold, laboratory equipment and business (R 209). This $75,000 is in addition to the value of the laboratory equipment (R 209). This premium of $75,000 is based on the fact that even if you have the equipment "to start from scratch with an empty building, no matter how well you plan it, you will run into a lot of confusion and have to shut down to change this and that to improve your methods of manufacture." (R 209). This ready-to-go value of $75,000 was based on the fact that he could make a profit of $5,000 a month (R 212). He admitted his entire opinion was based upon profits (R 215-216). If the business was losing money he would not pay this price for the leasehold (R 216). In ordinary times Charley would not pay for the ready-to-go value, but in 1942 the war orders were very large (R 210). It would take eight or nine months to assemble the equipment in July, 1942 and it would take "another six months to get all the kinks out of it to get it operating properly" (R 211).

DAVID KLEIN. This witness, likewise a Chicago pharmaceutical manufacturer unfamiliar with real estate values (R 227) testified substantially the same as Charley. That over and above the claimed improvements of $41,762.92 shown on Exhibit 26 (R 67, 71-73, 78-79, 276-277, 284, 446) he testified

> "that it would have been worth $80,000 for the privilege of taking that equipment as such and operating." (R 225).

This going value of $80,000 was based upon the fact that a plant all set up has a much greater value than a plant on paper, and you could immediately start to fill orders (R 226). This was over and above the laboratory equipment and is based upon a combined sale of the leasehold and laboratory equipment and business (R 225, 227). The

figure as to "ready-to-go" value was based entirely upon future profits (R 227-228, 230, 234).

The verdict and judgment were of necessity based in large part upon this testimony which was allowed to stand and go to the jury, because the jury verdict of $48,331.35 exceeded Lakeside's only evidence as to the cost of improvements which totalled about $40,000. The District Judge throughout the entire trial expressed grave doubt as to the validity of the claim for "ready-to-go" value (R 55, 173, 218-219, 278, 288, 320, 411, 412). The trial judge, though receiving the proof pertaining to "ready-to-go" value repeatedly stated that the government did not take the machinery nor the business and that the same could not be compensated for (R 55, 174, 400, 375, 408).

The District Court held that the sale clause of $4,500 (R 429) the amount to be paid to the respondent upon sale of the leased property was inapplicable (R 409). It also held that the condemnation clause (R 301, 329, 349, 409) inapplicable. The Circuit Court of Appeals affirmed the judgment, Judge Evans dissenting as to the inapplicability of the sale clause. The Circuit Court of Appeals apparently held that its decision in the General Motors Case, as modified and affirmed by this Court, determined that "ready-to-go" value claimed by Lakeside was proper. The Circuit Court of Appeals admitted, however, that the General Motors Case was "not completely parallel."

QUESTIONS PRESENTED

A. Whether on condemnation by the United States of real estate only (an entire leasehold), just compensation includes so-called "ready-to-go" value (over and above the fair market value of the real estate), which so-called

"ready-to-go" value is based upon what an alleged purchaser of the interest in real estate combined with the machinery and the business would be willing to pay in order to go into possession and continue production and avoid all delays, expense and inconvenience incidental to getting the equipment and business operating, and which was arrived at by estimating the value of attainable future profits of a pharmaceutical business to be operated on the real estate?

B. Whether in a condemnation of the entire term of a leasehold the lessee is entitled to claim the reproduction cost of improvments and cost of installing machinery (Exhibit 26 (R 67, 71-73, 78-79, 276, 277, 284, 445-453), unaccompanied by any evidence of the value of the use, where under the terms of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the balance of the demised term? (R 417, 429).

C. Whether in condemnation by the United States a lease stipulation (R 428) fixing the amount to be paid to the lessee on sale of the leased premises is inapplicable where the lease contains a condemnation clause which, as construed below, excludes condemnation by the United States?

D. Whether a condemnation clause in a lease (R 419) which is inclusive of condemnation "by any company or corporation lawfully qualified to exercise the right of eminent domain" applies to a condemnation by the United States?

REASONS FOR GRANTING THE WRIT

A. In the instant case the Government took the entire fee of Eline's, and the entire leasehold of Lakeside, and hence as the Circuit Court of Appeals purported to recognize the facts differ from those of the *General Motors Case*. How-

ever, the decision of the Circuit Court of Appeals in allowing on the supposed authority of *U. S. v. General Motors,* 65 S. Ct. 357, 89 1. ed. Adv. Op. 379, as a part of just compensation, "'ready-to-go" value which is a value over and above the fair market value of the real estate taken, and which is based upon what an alleged purchaser of real estate combined with the equipment and business would be willing to pay in order to go into possession and start production and avoid all delays, expense and inconvenience incidental to getting the equipment and business operating (arrived at by a capitalization of obtainable future profits) is a decision of a federal question in a way probably in conflict with the applicable decisions of this court, particularly those of *Mitchell v. United States,* 267 U. S. 341, *Bothwell v. United States,* 254 U. S. 231, and *United States ex rel T. V. A. v. Powelson,* 319 U. S. 266. Although this Court in the General Motors Case denied that it was overruling the long line of decisions of this court relating to consequential damages, the Circuit Court of Appeals in this case has in effect construed the decision in the *General Motors Case* as reversing the rules of consequential damages.

Petitioner has been informed that the government has filed or will shortly file a petition for writ of certiorari to review a decision in *United States of America v. Petty Motors* (CCA 10, March 5, 1945) 147 Fed. (2) 912 in which the tenth circuit has likewise construed this Court's decision in the *General Motors Case* 65 S. Ct. 357, 89 1. ed. 379, as reversing the rule of consequential damages in leasehold cases.

B. The decision of the Circuit Court of Appeals in allowing a lessee to recover the reproduction cost of improvements and cost of installing equipment, unaccompanied by any evidence of the value of the use (where under the terms

of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the balance of the demised term (R 417, 429)) is in conflict with *Carlock v. United States,* 53 Fed. (2) 926, 927 (C. C.A. D. of C.) and other decisions, and is an important question of Federal Law relating to compensation in condemnation which has not, but should be settled by this Court.

C. The decision of the Circuit Court of Appeals holding that the liquidated damage or sale clause does not limit the compensation recoverable from the United States for the taking of respondent's leasehold seems to involve an important question of Federal law relating to compensation under the Fifth Amendment, payable to a lessee, which has not been but should be settled by this Court.

D. The decision of the Circuit Court of Appeals holding that the United States is not a corporation within the meaning of the condemnation clause of the lease seems to involve an important question of Federal law which has not been but which should be settled by this Court.

WHEREFORE, this petitioner prays that a writ of certiorari be granted so that this case may be reviewed by this Court; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, May 17, 1945.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The rulings of the District Court, Judge F. Ryan Duffy presiding, were made during the trial and in respect to the claim of so called "ready-to-go" value appear on pages (R 55, 173-174, 218, 278, 288, 320, 408, 411-412 of the record, in respect to the inapplicability of the sale clause on page 409 of the record, and in respect of the inapplicability of the condemnation clause on pages 301, 329, 347, 409 of the record.

The majority and minority opinions of the Circuit Court of Appeals for the Seventh Circuit were filed March 5,

1945, and appear at page 495 of the record. They are reported in 148 Fed (2) Adv. Op. 39.

JURISDICTION

This has already been stated in the petition at page 2 which is hereby adopted and made a part of this brief.

SUMMARY STATEMENT

The essential facts of the case are set forth in the accompanying petition for writ of certiorari, and in the interest of brevity are not repeated here. Any necssary elaboration of the evidence on the points involved will be made in the course of the argument which follows:

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

A. In allowing as part of just compensation where real estate (an entire leasehold) only is condemned by the United States so-called "ready-to-go" value, which is a value over and above the fair market value of the real estate, and which was based upon what an alleged purchaser of the interest in real estate combined with the equipment and business would be willing to pay in order to go into possession and continue production and avoid all delays, expense and inconvenience incidental to getting the equipment operating, and which was arrived at by an estimate of the value of attainable future profits of a pharmaceutical business to be operated on the real estate.

B. In holding that a lessee was entitled to claim the reproduction cost of improvements and cost of installing machinery (Exhibit 26, R 67, 71-73, 78-79, 276-277, 284) unaccompanied by testimony as to the value of the use,

when under the term of the lease (R 417, 429) all improvements made by lessee were lessor's property subject to use the same during the remainder of the demised term.

C. In holding that the compensation payable to the respondent by the United States was not limited by the sale clause of the lease.

D. In holding that condemnation by the United States was not within the scope of the condemnation clause.

SUMMARY OF ARGUMENT

POINT A

The Circuit Court of Appeals has construed the decision of this Court in the General Motors Case, 65 S. Ct. 357, 89 l. ed. 379 as overruling Mitchell v. U. S. 267 U. S. 341, Bothwell v. U. S. 254 U. S. 231, U. S. ex rel T.V.A. v. Powelson, 319 U. S. 266, and long line of cases all to the effect that loss of profits, inconvenience, and consequential damages are not to be compensated for in condemnation.

Lakeside's witnesses found no enhancement in the rental value of the original cafeteria lease. Lakeside's witnesses admitted that the annex erected by Lakeside costing about $21,000 would have a thirty-five cent rental value per square foot per year (the same as the original cafeteria) (R 198, 251-252) but they did not value it for the balance of the term on a fair rental basis. The total reproduction cost of the improvements added by Lakeside, including the improvements in the original cafeteria, cost of the annex, and the cost of installing the laboratory equipment was $41,762.92 (R 446). The verdict of $48,331.35 was in excess of the total value of the improvements in the cafeteria building, the cost of the annex and the cost of installation, even if we assume for the purpose of argument that the value of the use of these improvements might be taken as the reproduction cost of the same. Part of the award is

"ready-to-go" value based solely upon testimony ascribing a special value to the leasehold by assuming a sale or offering of the lease in combination with the business and equipment of the lessee (which equipment the lessee was compelled to remove under the lease (R 419)), because the alleged purchaser could immediately produce pharmaceutical products and avoid all delays, expenses and inconvenience incidental to getting the pharmaceutical plant operating. Lakeside moved its business and has it and all its equipment operating elsewhere. Its only loss, whether characterized as so-called "ready-to-go" value, or good will, is nothing more than that intangible benefit to a business of continuing in its present location and thus avoiding loss of profits, inconvenience and delay, which goes with moving. This Court has ruled many times that these losses are not compensable and has re-affirmed this ruling in the *General Motors Case,* 65 S. Ct. 357, 89 1. ed. 379, 383.

The majority opinion of the Circuit Court of Appeals quotes the *General Motors Case* 65 S. Ct. 357, 89 1. ed. 379, and particularly that portion referring to the unusual situation there presented because of the fact that only a portion of the sublease was taken and it was necessary for General Motors to move out and in. The opinion of the Circuit Court of Appeals entirely overlooks the following portions of this Court's decision in the *General Motors Case*:

> "The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, *the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign.* No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, there-

fore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government. We are not to be taken as departing from the rule they have laid down, which we think sound." (Page 383).

"*When it takes the property, that is, the fee, the lease, whatever he may own,* terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress." (page 384).

(Italics ours)

This court further pointed out (page 384) that the *General Motors Case,* where it was necessary to move out and back as the entire lease was not taken, is entirely different from a situation where the fee or entire lease is taken. In this case the entire fee and entire Lakeside lease was taken. If there is anything in the *General Motors Case* which overrules the long line of authorities of this court that consequential losses are not compensable under the Fifth Amendment, then it is submitted that a question of general importance is presented by the instant case which should be decided by this court. With the possible exception of the *General Motors Case* as construed in the *Eline Case* there are no decisions of the Federal Court supporting a so-called "ready to go" value or intangible value resulting from the fact that it is not necessary to move and production will not be interrupted.

In *Mitchell v. U. S.* 267 U. S. 351 this court denied an owner compensation for the destruction of his business,

which resulted from the taking of his land for public project, even though his business could not be re-established elsewhere. See also:

Bothwell v. U. S. 254 U. S. 231 to the same effect. This court had occasion in *U. S. ex rel T.V.A. v. Powelson,* 319 U. S. 266, 281, to review the long line of decisions of this court relating to consequential losses, and there again stated:

> "There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment . . . 'There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.' 267 U. S. p. 345. That which is not 'private property' within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United tSates. But like the business destroyed but not 'taken' in the Mitchell Case it need not be reflected in the award due the landowner unless Congress so provides."

This Court further said (page 282) that "going concern value of the enterprise" is only a part of just compensation where business is taken.

In the *General Motors Case,* 65 S. Ct. 357, 89 1. ed. 379, 383 this court re-affirmed the rule established in the foregoing cases.

Lakeside attributes all the values of the operation of the business to the leasehold and not to the earning power of the equipment, good-will and business management. The equipment is set up and operating elsewhere. Lakeside is still in the pharmaceutical business. The fact that Lakeside's business in Milwaukee might have been sold at a profit is not determinative of the value of the leasehold upon which the business is conducted. Certainly there is no

warrant for charging Eline's with losses necessary to moving when under the lease Lakeside would have been forced to move at a later date. Whether so-called "ready-to-go" value is applied to a fee taking or leasehold taking it represents the advantage to an owner of continuing in the existing location rather than being subjected to the inconvenience of moving. Whatever label is used, it is actually a form of recovery for losses and expenses produced by moving. The fact that it is a business loss rather than a value inherent in the real estate is demonstrated by the fact that Lakeside's witnesses as to "ready-to-go" value admitted that if the business was not making money, there would not be a "ready-to-go" value (R 216, 234).

This evidence was received over objection (R 208, 210, 212, 215-216, 218, 225, 230, 234, 235). Eline's motion to strike was overruled (R 218-219, 235) and the evidence was allowed to stand before the jury (R 411). The jury was instructed that the evidence remained in the case (R 411).

The majority opinion of the Circuit Court of Appeals (R 497) points out that the instructions of the trial court clearly defined the theory of valuation as the difference between the market value of the use for the balance of the term minus rent payable. Eline's has no quarrel with the instruction of the trial court, but the instructions could not cure an award where everything over $40,000 is of necessity based upon so-called "ready-to-go" value. The Circuit Court of Appeals avoided discussing the real issue in the case—namely, is "ready-to-go" value part of just compensation, but on the basis of the General Motors Case held that it was. The majority decision of the Circuit Court of Appeals necessarily holds that "ready-to-go" value may be included as part of just compensation because absent that

element of "ready-to-go" value, there is no evidence to support a verdict of more than $40,000.

Eline's entered into an agreement with the Government on the assumption that all the ordinary rules as to limitations of compensable losses applied, but now under the Circuit Court of Appeals decision it has been ruled that such consequential losses are compensable when an entire leasehold is taken. If this decision is a standard for the future, then the same mathematical process can be used on fee property of which the owner is the occupant and upon which he conducts a business. If this decision stands, the United States will be subjected to tremendous claims of a type not heretofore allowable for damages in condemnation cases and all the rules of law laid down by this Court as to limitation of such claims will be circumvented. Indirectly recovery for these losses may be made by using these losses to value a fee or a leasehold, whereas directly they are not compensable under the Fifth Amendment. Lakeside indirectly recovered for loss of profits, inconvenience, and delay forbidden elments of compensation in condemnation, by valuing the leasehold in connection with a combined sale of the business and leasehold. The effect of such evidence on the cost to the government of condemning leaseholds is illustrated by a comparison of the award in this case of $48,331.35 to the undisputed testimony that the value of the cafeteria and annex together with the land had a market value of $45,000; deducting $5,000 for the land leaves a value for the cafeteria and annex of about $40,000 (R 317, 320, 350, 352). Lakeside's own real estate expert was forced to admit the unsoundness of its claim when he stated that the tenant's rights were greater than if "Lakeside had a deed" (R 266).

POINT B

Decision of Circuit Court of Appeals as to improvements, cost of annex and cost of installing laboratory equipment claimed by lessee is in conflict with other federal cases, and is an important question of law in condemnation which should receive ultimate determination.

Exhibit 26 (R 67, 71-73, 78-79, 276, 277-284, 445-453) showing reproduction cost of improvements in the cafeteria building, the cost of erection of the annex, and cost of installing machinery, was admitted in evidence over Eline's objection (R 67, 71-73, 78-79, 276-277, 284). Lakeside's own experts admitted they made no attempt to appraise the value of the use of the improvements (R 144-145, 246, 251). The trial court seriously questioned the admissibility of this evidence (R 67, 71-72, 78, 406-407).

The Circuit Court of Appeals approved of the admission of Exhibit 26 because the trial court told the jury to consider it with caution. The jury was therefore allowed to guess as to the use value. The correct instructions by the trial court as to use value could not cure the prejudicial admission of Exhibit 26 without testimony as the value of the use.

The decisions all hold that under lease provisions such as in this case the lessee is entitled to only use value as a part of just compensation.

Carlock v. U. S. 53 Fed. (2) 926, 927 (CCA D. C.)
U. S. v. Certain Parcels of Land, 54 Fed. Supp. 561, 562.
Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746.
Fiorini v. Kenosha, 208 Wis. 496, 243 N. W. 761.

If this decision of the Circuit Court is to stand, when the Government condemns an entire leasehold, it will have to pay the reproduction cost of the improvements and the

cost of installing machinery by a lessee, because the lessee will claim the entire cost and ignore proving the use value of the improvements during the balance of the term of the lease.

The cost of installing laboratory equipment ($3,820.32) (R 446) is not compensable because it is an item of consequential damage where the entire lease is taken.

POINT C

The decision of the Circuit Court of Appeals involves an important question of federal law which should receive ultimate determination.

The modification agreement contained a sale clause (R 428) to the effect that at any time during the year following September 30, 1943, on four months' written notice, in the event of a sale of the Eline plant, or the portion occupied by Lakeside, Lakeside was required to vacate and accept $4,500, or amounts scaling down to $800 over the remaining years of the extended term.

On the day the petition for condemnation was filed, the District Court entered an order of immediate possession of the unoccupied portion as of April 30, 1942 (R 7). Lakeside was given prompt notice of the condemnation (R 292, 293, 457). On June 16, 1942 Eline's gave the United States, at its request, a written option to purchase the property pursuant to 50 U.S.C.A. 171. This option was accepted by the Government on August 1, 1942 (R 15). The option provided that if the Government did not desire to take title by deed, it might file a declaration of taking, the price in the option in that case to control.

A long line of cases have held that a condemnation is a sale.

American Creameries v. Armour, 149 Wash. 690, 271 Pac. 896.

United States v. Certain Parcels of Land, 51 Fed. Supp. 811.

Vandermulen v. Vandermulen, 108 N. Y. 195, 15 N. E. 383.

Atlanta, Knoxville and Northern R. R. v. So. Ry. Co. (CCA) 131 Fed. 657.

Jackson v. State, 213 N. Y. 34, 106 N. E. 751.

Bell Telephone v. Parker, 187 N. Y. 299, 79 N. E. 1008.

The majority opinion of the Circuit Court of Appeals holds that because the parties failed in the condemnation clause to expressly name the United States, condemnation by the United States could not be a sale within the terms of the sales clause. If the condemnation clause was limited as claimed by the majority opinion, it performs no functions in the case and the sales clause is to be construed as if the condemnation clause were excised from the lease. The two provisions were complementary and meant to exhaustively cover the lessee's interest in the property. There is no conflict or inter-relationship between the condemnation clause and the sales clause. Both may stand without either impinging on the other.

A number of Federal decisions have held that the option agreement used in this case created a binding vendor-vendee relationship between the government and the property owner.

U. S. v. Scott, 140 Fed. (2) 941 (CCA 8).

Wachovia Bank and Trust Company v. U. S. 98 Fed. (2) 609 (CCA 4).

U. S. v. 325 *Acres of Land,* 53 Fed. Supp. 884.

In Danforth v. U. S. 308 U. S. 271, 282, this court, speaking of this type of option said:

> "We have no doubt that the authority to purchase given to the Secretary of War is sufficiently broad to authorize a purchase of petitioners' interest in land subject to perfecting the title through condemnation."

POINT D

The decision of the Circuit Court of Appeals holding that the United States is not a corporation within the meaning of the condemnation clause involves an important question of federal law which should receive ultimate determination.

The condemnation clause (Clause 13) provides:

> "Lessee further agrees that if at any time during the term of this lease the said premises, or any part thereof, shall be acquired or condemned and/or purchased by any municipality or political subdivision of the state wherein said premises are located, or by any company or corporation lawfully qualified to exercise the right of eminent domain, the lessor shall have the right to cancel and terminate this lease by giving to lessee not less than four months written notice of such intention to cancel, and in the event of any such acquisition or condemnation of said premises or any part thereof, the lessee shall, and as part of the consideration hereof, does hereby asign to lessor all of lessee's claims, rights and causes of action on account thereof, together with all of the lessee's right, title and interest, under and by virtue of this lease." (R 419).

A long line of cases hold that the United tSates is a corporation.

U. S. v. Maurice, 109 Fed. Case 15, 747, 2 Brock U. S. 96.

Helvering v. British, American Tobacco Co. 69 Fed. (2) 528, 530.

Helvering v. Stockholms Enskilda Bank, 293 U. S. 84, 92.

Respublica v. Sweers, 1 U. S. 41, 1 Dall. 41.

Cotton v. U. S. 11 Haw. 229, 331.

Stanley v. Schwalby, 147 U. S. 508, 517.

The decision of the Circuit Court to the effect that the United States is not a corporation within the terms of the clause is based principally on *U. S. v. Cooper,* 312 U. S. 600. An analysis of the *Cooper Case* and later decisions of the court show that this case does not so hold. The *Cooper Case* involved the Construction of the word "person" defined in the Sherman Act as follows:

> "The word 'person or persons' whenever used * * * shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the Laws of any of the territories, the laws of any state or the laws of any foreign country."

All the court held was that under this definition the United States could not be treated as a corporation organized under its own laws and could not exist under itself. (In Clause 13 the word "corporation" is not qualified as in the above definition.) The majority opinion of this court does not deny the corporate status of the United States but merely holds that it is not within the class of corporations to whom the benefits of the act were intended to be extended.

This Court had occasion recently in the case of *Parker v. Brown,* 317 U. S. 341, 87 L. ed. 235, 241 to consider the *Cooper Case* in this respect and said:

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The

act is applicable to 'persons' including corporations (Sec. 7), and it authorizes suits under it by persons and corporations (Sec. 15). A state may maintain a suit for damages under it, Georgia v. Evans, 316 U. S. 159, 86 L ed. 1346, 62 S.Ct. 972, but the United States may not, United States v. Cooper Corp. 312 U. S. 600, 85 L. ed. 1071, 61 Sup. Ct. 742—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute."

In the recent case of *State of California v. U. S.* 320 U. S. 577, 585 this court held that the State of California fell within the term "person" which is defined as "corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District or Possession thereof or of any foreign country" (46 U.S.C.A. 801). This court pointed out that a different construction "would have such dislocating consequences."

Under the position taken by the Circuit Court of Appeals condemnation exercised through any corporation created either by the United States or the State of Wisconsin would fall within the clause, while a condemnation which was carried on directly by the United States or the State of Wisconsin rather than by a delegated agency or instrumentality would not fall within the clause.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 1303

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,
Defendants.

ELINE'S INC.,
Petitioner and Appellant Below

vs.

LAKESIDE LABORATORIES, INC.,
Respondent and Appellee Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Page

1. This is companion case to case of *Eline's, Inc. (Petitioner and Appellant below) vs. Gaylord Container Corp. (Respondent and Appellee below)*, case No. 1302, also before this court on Petition for Certiorari, was tried before same trial judge, by same counsel, and involved same issues of law and fact as in Gaylord case. Decision of Seventh Circuit Court of Appeals herein adopted that court's opinion in Gaylord case 1

2. In this (Lakeside) case trial court applied correct rules of valuation in determining just compensation for leasehold interest and properly instructed the jury (R. 407-8); as to business profits not being a proper basis of valuation (R. 411-12); as to cost of installations and improvements (R. 407); and as to Lakeside's construction of additional building on leasehold premises (R. 411)..... 2-3

3. Seventh Circuit Court of Appeals held here as in Gaylord case that trial court adopted correct measure of damages. In view of considered and elaborate instructions on the proper application of evidence, jury could not have been misled and instructions could not have left any misunderstanding with jury as to proper application of evidence..... 4

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This is a companion case to the case of *Eline's Inc. (Petitioner and Appellant below) vs. Gaylord Container Corp. (Respondent and Appellee Below)*, Case No. 1302. It was tried before the same court, by the same counsel, and involved the same issues of law and fact as the Gaylord case. The decision of the Seventh Circuit Court of Appeals in this case merely adopted that court's opinion in the Gaylord case (R. 497).

The Petition for Writ of Certiorari in this case follows the same pattern as the Petition in the Gaylord case, No. 1302. No useful purpose would be served by

duplicating the respondent's brief. By way of emphasizing what was said in our brief in the Gaylord case, to the effect that the trial court had applied the correct rules of valuation in determining just compensation for a leasehold interest, we wish to point to certain portions of the trial court's instructions to the jury in this case:

(a) *On expense of moving, loss of profits, etc.,* the court said (R. 407-8):

> "You are not permitted, and I want to get this clear in your mind, and I think counsel, in part, have emphasized the same thing—you are not to make any allowance for damages to the personal property of the tenant or for the expense of removing the same, nor for any loss of profits, nor for expenditures to secure a new location, nor any higher rent that might have to be paid elsewhere. You are not to make any allowance for expenditures to prevent a loss of trade, nor for the inconvenience or interruption of business suffered by the necessity of moving. Neither is the loss of good will a proper element of damages, nor are losses in the business because of the necessity of giving up conveniences that the tenant may have enjoyed on the premises which are condemned. None of these are recoverable."

(b) On *Business profits* as a basis of valuation, the court said (R. 411-12):

> "A number of witnesses have testified as to their opinion of the fair market value of the leasehold. * * * If you find that any expert in valuing the leasehold based his opinion upon the production of the business or avoidance of losses or inconvenience, you may disregard such testimony as being of any evidence as to the value of the lessee's interest. This is due to the fact that income from a business conducted on a property is not evidence of the value of the leasehold because there are so many things

that enter into income or profits, and they are too speculative and uncertain."

(c) On *cost of installations and improvements,* the court said (R. 407):

"The rule may be stated: The value of improvements made by the lessee which are to become the property of the lessor at the end of the term and installation costs which would be of little or no value to the lessor should be included to the extent only to which they enhance the market value of the leasehold for the balance of the term.

"Now, many references were made by counsel to Exhibit 26. You will recall that I stated during the trial that I received Exhibit 26 into evidence with some reluctance because I feared that it might be confusing to the jury. I instructed you that the exhibit should be received with great caution. I told you that the items of cost were not in themselves elements for which you can make allowance. These items are not to be considered by you except in so far as they increase or enhance the rental value for the balance of the term. I emphasize the rental value."

The court continued with respect to Lakeside's construction of the annex building (R. 411):

"Lakeside is not entitled in this proceeding to receive compensation for the cost or the replacement value or the unamortized value of that building, because, according to the terms of the lease, it had to leave same on the premises when the term ended by lapse of time or otherwise. That is, you do not consider it except that you can consider it to the addition that the building increased the fair rental value for the balance of the term over and above the amount of the rent that was required to be paid."

In the light of these instructions which aptly describe the rules by which the trial court was guided in admitting evidence of value, we submit the Circuit Court of Appeals was amply justified in concluding (R. 497):

> "We also held in that case, as we hold here, that the trial court adopted the correct measure of damages and that in view of the Court's considered and elaborate instructions to the Jury on the proper application of the evidence that the jury could not have been misled. The Court's instructions to the jury in the instant case were in all respects similar to those given in the Gaylord case, and in view of their clarity could not have left any misunderstanding with the jury as to the proper application of the evidence."

The Petition for Writ of Certiorari should be denied.

Dated: June 11, 1945.

Respectfully submitted,

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VICTOR M. HARDING, JR.
Attorneys for Lakeside Laboratories, Inc., Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1302

ELINE'S INC., PETITIONER

v.

GAYLORD CONTAINER CORPORATION

No. 1303

ELINE'S INC., PETITIONER

v.

LAKESIDE LABORATORIES, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

These two cases arise out of condemnation proceedings instituted by the United States to acquire the fee simple title to certain lands in Milwaukee, Wisconsin. Approximately 91 acres of the land taken was owned by petitioner Eline's,

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Inc., and was improved by industrial buildings. Portions of the property were occupied by Lakeside Laboratories, Inc., and Gaylord Container Corporation under leases from Eline's, Inc. The United States agreed with Eline's as to the amount of compensation to be paid for the entire property and paid the agreed sum, $2,290,000, into court. This payment discharged the obligation of the United States, and the United States has no pecuniary interest in proceedings for distribution of the fund between the various claimants.[1]

Nevertheless, although the United States did not participate in either the trials or the appeals of these proceedings between claimants to the fund, the United States is directly interested in the validity of certain of the propositions of law deemed by the lower courts to be controlling, and presented for the consideration of this Court in the petitions for writs of certiorari. The controversy in each case is between the fee owner of the land and a tenant, as to the proper measure by which to determine the amount to which the tenant was entitled out of the sum paid by the United States for the fee. The court below rejected contentions of the fee owner that this

[1] *United States* v. *Dunnington*, 146 U. S. 338, 351; *Eline's, Inc.* v. *Town of Milwaukee, Wis., et al.*, 135 F. 2d 878 (C. C. A. 7). Indeed, the United States was not even entitled to notice of such proceedings. *United States* v. *Certain Lands in Town of Hempstead, Nassau County, New York*, 129 F. 2d 918 (C. C. A. 2).

amount was controlled by certain lease provisions;[2] and it plainly regarded the cases as governed by the same criteria as would have been applicable if the controversy had been between the tenant and the United States. This appears from the court's express reliance in its opinions on the decision of this Court in *United States* v. *General Motors Corporation,* 323 U. S. 373—a decision which, of course, dealt directly and exclusively with the liability of the United States upon condemnation of a leasehold.[3] Accordingly, there is likelihood that the rulings below will be urged as precedents to the disadvantage of the United States in future litigation to which it may be a party.

In the *General Motors* case, this Court said (323 U. S. at 379):

[2] The petitions for writs of certiorari seek to present the questions whether a lease provision for termination of the lease upon condemnation "by any company or corporation lawfully qualified to exercise the right of eminent domain" was effective upon condemnation by the United States, and, if not, whether the condemnation brought into play a separate provision for liquidated damages upon sale of the property. The United States does not desire to take any position on these questions, at least at this stage of the litigation, and this memorandum is not concerned therewith.

[3] That the trial court followed the same view appears from the fact that the judge, in ruling on the admissibility of evidence and in instructions to the jury, repeatedly pointed out that the United States had not taken either the machinery or the business, and that the value of the leasehold alone was therefore at issue (No. 1302: R. 87, 163, 205, 492, 529; No. 1303: R. 55, 174, 375, 408).

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. * * * We are not to be taken as departing from the rule they have laid down, which we think sound.

In the instant cases, the United States took the fee. Nevertheless, the circuit court of appeals sustained the method of valuation employed at the trial, saying:

> The instant case is not completely parallel with the *General Motors* case, and not all that is said in that opinion is applicable to the facts here, but in so far as applicable we think the principles there enunciated were properly applied.

We construe the *General Motors* decision as being inapplicable where, as here, the United States condemns a fee title, as well as where the United States condemns for a period of time longer than the term of existing leases. We deem it important that the limitations of the *General Motors* decision be made clear to the lower courts, in order that the doctrine of that case be not misapplied to the detriment of the Government. To this end the

United States has filed a petition for writs of certiorari (Oct. Term 1944, Nos. 1272–1278) to review the decision of the Circuit Court of Appeals for the Tenth Circuit in *United States* v. *Petty Motor Company*, et al., 147 F. 2d 912, where, it is believed, the *General Motors* decision was misapplied to sustain the admission of evidence of removal costs and consequential damages in the valuation of the rights of tenants whose terms were of shorter duration than that taken by the Government. The instant cases, it is believed, involve a comparable misapplication of the doctrine of the *General Motors* case, and present equally cogent grounds for the issuance of the writs of certiorari prayed by the petitioner. If the writs are granted, the United States proposes to participate in the cases on certiorari because of the importance of determining the correct application of the *General Motors* decision.

Respectfully submitted.

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